

EXHIBIT 2

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 and Dunning Enterprise, Inc.
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9 UNITED STATES DISTRICT COURT
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 11 SAN JOSE DIVISION
 12

13 EBAY, INC.,

14 Plaintiff,

15 v.

16 DIGITAL POINT SOLUTIONS, INC., SHAWN
 HOGAN, KESSLER'S FLYING CIRCUS,
 17 THUNDERWOOD HOLDINGS, INC.,
 TODD DUNNING, DUNNING ENTERPRISE, INC.,
 18 BRIAN DUNNING, BRIANDUNNING.COM, and
 DOES 1-20,

19 Defendants.
 20
 21

CASE NO.: CV-08-4052 JF

**DECLARATION OF ROBERT J.
 BREAKSTONE IN SUPPORT OF
 DEFENDANTS TODD DUNNING
 AND DUNNING ENTERPRISE,
 INC.'S MOTION TO STAY
 ACTION PENDING RESOLUTION
 OF CRIMINAL PROCEEDINGS**

Date: November 20, 2009
 Time: 9:00 a.m.
 Place: Courtroom 3, 5th Floor

Hon. Jeremy Fogel presiding

FREELAND COOPER & FOREMAN LLP

150 Spear Street, Suite 1800
 San Francisco, California 94105

1 I, Robert J. Breakstone, declare:

2 1. I am an attorney licensed to practice in the State of California and the State of
3 Illinois. My practice includes representing individuals involved in criminal investigations and
4 under indictment for violations of federal criminal law, including crimes of fraud, theft of
5 intellectual property, and racketeering activity.

6 2. On July 13, 2007, I was retained by Todd Dunning in connection with a criminal
7 investigation being conducted by the United States Department of Justice / Federal Bureau of
8 Investigation in the Northern District of California.

9 3. In connection with my representation of Todd Dunning, I contacted Assistant
10 United States Attorney Kyle F. Waldinger who is in charge of the Computer Hacking and
11 Intellectual Property Unit ("CHIP Unit") of the Office of the United States Attorney for the
12 Northern District of California. Mr. Waldinger confirmed that there was a grand jury
13 investigation involving Kessler's Flying Circus and Todd Dunning. Mr. Waldinger further
14 confirmed that in connection with the investigation, the FBI had conducted several searches
15 pursuant to warrant and that the FBI had interviewed Todd Dunning. Mr. Waldinger further
16 indicated that he was aware that Commission Junction, Inc. had filed a civil action against Todd
17 Dunning and Kessler's Flying Circus, among others. I indicated to AUSA Waldinger that no
18 further contacts of Todd Dunning should be undertaken by Department of Justice personnel since
19 Todd Dunning was represented by counsel.

20 4. In a subsequent telephone conference with Mr. Waldinger I asked whether it would
21 be possible for Todd Dunning and Kessler's Flying Circus to obtain a copy of the computer hard
22 drives and other records seized by the FBI from Brian Dunning's home. I explained that Todd
23 Dunning and Kessler's Flying Circus needed those records in order to defend the case brought by
24 Commission Junction, Inc. (Case No. 30-2008 00101025, Superior Court of the State of
25 California, County of Orange Central Justice Center). Mr. Waldinger said that he would think
26 about the request, but did not believe Todd Dunning had standing to challenge the seizure of the
27 computer and records seized from his brother's house. I understood this to mean Mr. Waldinger
28 believed that Todd Dunning was not entitled to copies of the records seized. He informed me

1 that Brian Dunning's criminal counsel had made a similar request. As of the date of execution of
2 this declaration, Mr. Waldinger has not changed his position.

3 5. On August 25, 2008, e-Bay, Inc. filed a complaint in Federal District Court for the
4 Northern District of California, San Jose Division (Case No. CV 08-4052-JF) against Todd
5 Dunning and others alleging fraud, racketeering, violation of California Penal Code, and
6 California Business and Professions Code 17200.

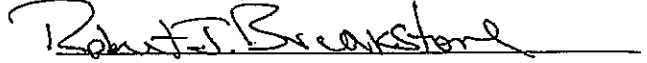
7 6. On September 16, 2008, I contacted AUSA Waldinger who stated that attorney
8 Sharon M. Bunzel (of O'Melveny & Myers) representing eBay in the aforementioned complaint (§
9 5 above) had sent AUSA Waldinger a copy of the complaint. AUSA Waldinger told me that
10 Todd Dunning was a "subject" of a federal criminal investigation and that the FBI would be
11 working aggressively to complete its investigation. The word "subject" is a term of art within the
12 United States Department of Justice, and it is to be distinguished from a "witness". According to
13 the United States Attorneys' Manual Section 9:11.151, it is the policy of the Department of Justice
14 to advise a grand jury witness of his or her rights if such witness is a "target" or "subject" of a
15 grand jury investigation. A "subject" of an investigation is a person whose conduct is within the
16 scope of the grand jury's investigation.

17 7. As a result of the ongoing criminal investigation involving Todd Dunning as a
18 "subject", I have advised Mr. Dunning to assert his Fifth Amendment privilege against self-
19 incrimination in response to any questions asked of him at any deposition, in response to any
20 interrogatory or request for admission, and in response to a demand for production of documents.

21 8. I have reviewed the complaint in this matter and based on my understanding of the
22 allegations and issues in this civil matter, Mr. Dunning plans to continue to assert his Fifth
23 Amendment privilege against self-incrimination. Based upon my experience, I believe that the
24 ongoing federal criminal investigation concerns identical issues raised in eBay's complaint. In my
25 opinion, any court order compelling Mr. Dunning to respond to the allegations of the complaint,
26 and/or to respond to discovery propounded to him would constitute "compelled self-
27 incrimination" within the meaning of the Fifth Amendment and California's constitutional
28 privilege against self-incrimination. (*See, People v. Lucas*, (1995) 12 Cal. 4th at 415, 453.)

1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct.

3 Executed this 30th day of September, 2009, at San Francisco, California.

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5 ROBERT J. BREAKSTONE
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